United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1848

IN THE UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

HERBERT GARVEY, Appellant vs. CASPER WEINBERGER, Appellee	)	CIVIL APPEAL NO. 74-1848

On Appeal From The United States
District Court for the
District of Vermont

BRIEF FOR APPELLANT

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I. PRELIMINARY STATEMENT

This case comes on appeal from a decision of Judge James S. Holden of the United States District Court for the District of Vermont. As far as counsel knows, Judge Holden's decision is unreported.

II. STATEMENT OF THE CASE

This case comes before the Second Circuit Court of Appeals on appeal from the decision of James S. Holden, dated May 31, 1974. The Appellant, Herbert Garvey, appeals from the decision dismissing his complaint, denying him class action status and denying him a three-judge court decision upon the constitutionality of 42 U.S.C. 405(j), 427 & 1302. Plaintiff initiated this cause of action in March 8, 1974, and amended his complaint April 1, 1974 in order to recover his status as payee on his Social Security checks. Plaintiff had been deprived of his status of payee on his Social Security checks by the Defendant through 42 U.S.C. 405(j), 427 and 1302 and its accompanying regulation, 20 C.F.R. 404.1601 through 404.1610 without any form of notice or hearing. Plaintiff sought declaratory judgment that 42 U.S.C. 404(j), 427 & 1302 were unconstitutional in that the statutes permitted a taking of property under the Fifth Amendment of the United States

constitution without notice or opportunity to contest said taking. Plaintiff further sought to mandamus the Defendant into restoring the status of payee on his Social Security checks. In the alternative, Plaintiff sought a declaratory judgment that 42 U.S.C. 405(j),427 & 1302 requires the recipient of Social Security checks to be granted a notice and a prior hearing before a representative payee could be appointed.

Plaintiff sought a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure to restrain the Defendant from continuing to pay Social Security benefits to the representative payee. The temporary restraining order was denied by Judge Holden on the grounds that the Plaintiff had been receiving the proceeds of the checks through the representative payee. The Court considered that as long as he was receiving the proceeds of the checks that there was no immediate and irreparable harm to continuing the representative payee status. Subsequently, on May 7, 1974, Plaintiff caused to be served upon the Defendant interrogatories pursuant to Rule 33 of F.R.C.P. in order to determine the size of the class and the identity of the members of the class. Those interrogatories were never answered by the Defendant. Instead, the Defendant made a Motion to Dismiss on May 29, 1974, and a hearing was held on May 31, 1974, on Defendant's Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction,

Class Action Status and Plaintiff's Motion for convening a Three Judge Court.

Prior to the May 31, 1974, hearing, on May 22, 1974, the Defendant sent out a notice to the Plaintiff restoring his status as payee on his Social Security checks. At the time of the hearing, it was unclear as to whether or not the Plaintiff had yet received that particular notice (Tr. 13) so the Court ruled that if Plaintiff had, indeed, not been restored to payee on his Social Security checks, then the case would not be dismissed. Subsequently, it became clear that the Plaintiff had been restored to his status as payee and the Court therefore issued an order of dismissal dated May 31, 1974. This order denied Plaintiff's motion to have the cause of action certified as a class action, denied plaintiff's motion to convene a three-judge court and dismissed the action of the Plaintiff. The Plaintiff filed a timely notice of appeal and has complied with all of the orders of the Appellate Court up until this time, seeking only to delay the initial civil appeal scheduling order. On June 26, 1974, the Court issued a Memorandum Opinion explaining its order of May 31, 1974.

III. ISSUES PRESENTED FOR REVIEW

A. WHETHER OR NOT THE PLAINTIFF'S CHALLENGE TO 42 U.S.C. 405(j), 427 & 1302 ALLOWING THE SOCIAL SECURITY ADMINISTRATION TO APPOINT REPRESENTATIVE PAYEES FOR PERSONS WHO ARE DEEMED TO BE INCAPABLE OF MANAGING THEIR OWN FUNDS WITHOUT NOTICE OR HEARING PRESENTS A SUBSTANTIAL FEDERAL QUESTION AND IS ENTITLED TO A THREE-JUDGE COURT.

B. WHETHER OR NOT THE RESTORATION OF THE PLAINTIFF'S SOCIAL SECURITY CHECK TO THE PLAINTIFF IN HIS OWN NAME CONSTITUTED MOOTNESS OF PLAINTIFF'S ACTION.

C. WHETHER OR NOT THE PARTY WHO HAS SOUGHT CLASS ACTION STATUS AND WHO HAS OBTAINED PART OF HIS GOAL SOUGHT FOR IN HIS CAUSE OF ACTION DEPRIVES HIM OF HIS ABILITY TO REPRESENT THE UNNAMED MEMBERS OF THE CLASS.

D. WHETHER OR NOT PLAINTIFF HAS MAINTAINED HIS BURDEN OF PROOF TO PROVE HIS CLASS ACTION ALLEGATIONS. OR IN THE ALTERNATIVE WAS NOT GIVEN THE PROPER OPPORTUNITY IN ORDER TO PRESENT THE INFORMATION.

IV. ARGUMENT

A. PLAINTIFF'S ATTACK ON THE CONSTITUTIONALITY OF SECTION 42 U.S.C. 405(j), 427 &1302 RAISES A SUBSTANTIAL FEDERAL QUESTION.

The trial Court ruled that Plaintiff was not entitled to convene a three-judge court in this proceeding.because Plaintiff had not raised a"substantial federal question" (Tr. 13 and Page 3 of Judge Holden's Memo and Opinion of June 26, 1974). It is clear from Judge Holden's Memorandum of June 26, 1974, that the basis for denial of the three-judge court was that the Plaintiff had already received the relief sought for by him in his Amended Complaint of April 1, 1974. The trial court cites California Water Service Co. v. City of Redding, 304 U.S. 252,254,255 (1938) and Hall v. Beals, 396 U.S. 45 (1969) to support the proposition that there is no longer a substantial question present. In Hall v. Beals (supra) , the Plaintiffs were asking that a Colorado residency of six (6) months be declared unconstitutional. By the time the case got to the Supreme Court, the Colorado legislature had changed the six (6) months residency requirement for voting to a two (2) months residency. The Plaintiff had been in Colorado for two months prior to the election and so, under the new residency, would have been eligible to vote. The Court rules therefore that the Plaintiff's case was moot.

However, in this situation, Congress had not changed Sections 405(j), 427 and 1302, nor has the Defendant Secretary of Health, Education & Welfare changed the regulations governing the employment of representative payees in 20 C.F.R. 404.1601 through 1610. Therefore, we must assume that the Defendant's attitude toward appointment of representative payees without notice and hearing continues as the official attitude and conduct of the Agency. Moreover, Appellant further concludes that the Social Security Administration returned Herbert Garvey's payee status merely to evade review by the Federal Court System.

Appellant contends that his challenge to the representative payee status does present a substantial Federal question. In Flemming v. Nestor, 363 U.S. 603 (1960), it was held that an employer under the Social Security Act had a sufficient interest to protect the employee from arbitrary acts of the government. In Goldberg v. Kelly, 397 U.S. 254 (1971) and the companion case of Wheeler v. Montgomery, 397 U.S. 280 (1970) the Court determined that recipients of Social Security benefits had a sufficient interest in his benefits in order to challenge the deprivation of these benefits without a prior hearing and due process of law. Appellant contends that his challenge to the representative payee status is a similar challenge in that no effort is provided to give the payee notice or a right to a hearing before his payee status is removed.

It is uncontested by the Defendants in this case that the only evidence before the Social Security Administration relating to Herbert Garvey's capacity to manage his funds was presented by Herbert Garvey's son, Robert Garvey. Robert represented that Herbert had been declared incompetent by the Fair Haven (Vermont)District Probate Court. Robert also obtained a physicians certificate that Herbert Garvey was not capable of managing his affairs. It later turned out that Herbert Garvey's son's representations concerning the declaration of incompetency was false. Thus the representative payee status was issued to Robert Garvey partially on misrepresented facts, illustrating the abuse that exists in the present system of appointing a representative payee without notice and hearing.

The Supreme Court of the United States set forth the criteria for a district court judge as to whether or not to convene a three-judge court in Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief and whether the case presented otherwise comes within the requirements of the three-judge statute."

Appellant has already set forth his claim that he has presented a substantial question.

Appellant only might add further that the court below was not impressed by the argument that the property right to

have monies controlled in one's own name (Memorandum Opinion, page 3) even though it was pointed out in Appellant's memorandum in support of his application for a temporary restraining order that under Vermont law, if a guardian were appointed for an incompetent without any notice to the prospective ward the appointment would be void. Shumway v. Shumway, 2 Vt. 339 (1829) Plaintiff contended that he had lost none of the proceeds only because of the intervention of his legal counsel and the threat of a lawsuit. This hardly would seem to be a secure position for the Appellant. Compare the situation in Gaddis v. Wyman, 304 F. Supp. 713, aff'd mem sub nom Wyman v. Bowens, 397 U.S. 49 where the plaintiffs were getting temporary welfare assistance pending an outcome of the case.

The second basis for granting a three-judge court: an attack upon the unconstitutionality of the statute as applied does not seem to be in question.

Thirdly, Appellant did seek equitable relief in applying for a preliminary and permanent injunction to halt the Defendant's current procedures in administering 42 U.S.C. 405(j),427 and 1302, (See allegations in paragraph 3 of Plaintiff's Complaint). The court did not grant the temporary restraining order and dismissed appellant's complaint before the merits were reached on the equitable relief. (Appellee did not maintain that its procedures were other than those alleged by the Appellant.)

The Appellees continue to administer its statutes and regulations throughout the United States in an unconstitu-

tional manner and therefore a three-judge court should be convened. Torres v. N.Y. State Dept. of Labor, 318 F. Supp. at 1324 and Torres v. N.Y. State Dept. of Labor, 405 U.S. 949 (1972) reh. denied 410 U.S. 971 (1973).

B. APPELLEE'S ACTION RESTORING THE APPELLANT'S STATUS AS PAYEE ON HIS SOCIAL SECURITY CHECK DOES NOT RENDER HIS CAUSE OF ACTION MOOT SINCE IT IS ACTION CAPABLE OF REPETITION EVADING REVIEW.

As has been said earlier, the trial court was convinced that by the Social Security Administration's restoration to Herbert Garvey of his status as payee on his Social Security checks, that the problem of notice and hearing prior to his deprivation of his status originally was cured. The trial court was also convinced that this type of action would not be repeated again. There was no representation by Mr. Reed, the Assistant U. S. Attorney, representing the Appellee, that the action taken against Mr. Garvey was a mistake and would not be repeated again. Nor was any representation made by Mr. Reed that the Social Security Administration recognized the defect in its representative payee regulation and was attempting to correct those defects or possible defects which would deny recipients of Social Security due process. Mr. Reed merely states,on Page 11 of the transcript, that "..... again, an item in response, not as anything as far as Plaintiff's argument goes but which is something that I just feel I should advise the

Court of or indicate, is that the Social Security Administration is looking into this matter and I would cite the case of Wright v. Richardson where the Supreme Court decided that the Social, that the Secretary has the right to sometimes review these procedures if there are raised issues of irregularity." (Tr. 11)

Appellant's interpreted this remark to mean that the original application by Herbert Garvey's son to obtain the representative payee status had been accomplished with some misrepresentations to the Social Security Administration. However, Appellant does not see this as a representation made to the Court that the Appellee intended to change its practices relating to the representative payee status. Appellant further argues that there is nothing which would stop the Appellee from doing the same thing to Mr. Garvey again and to other members of the class which Mr. Garvey represents. That is, nothing would seem to stop the Appellee from taking this action again except further intervention by the U. S. District Court. In order to have a repetition of Mr. Garvey's problem, his son, or another member of the family, would merely have to go back to the Social Security Administration and represent to them that Mr. Garvey is incapable of managing his affairs and get a doctor's statement signed to that effect. His check would, again, be removed to a representative payee and he would have no notice or opportunity to rebutt his change in status except after the fact.

The United States Supreme Court has held on many occasions that a voluntary cessation of wrongdoings on the part of the Defendant does not make a case moot. See Roe v. Wade, 410 U. S. 113, 120 (1973); U.S. v. W. T. Grant Co., 345 U.S. 629 (1953); U.S. v. Trans-Missouri Freight Assoc., 167 U.S. 290 (1897); Walling v. Helmerich & Payne, Inc., 323 U.S. 37 (1944); and more recently, DeFuenis v. Odegaard, 40 L.Ed. 2d 164; Southern Pacific Terminal Co. v. ICC, 219 U.S. 498,515; Moore v. Ogilvie, 394 U.S. 814; Gaddis v. Wyman, 304 F. Supp. 713,717, aff'd mem sub nom Wyman v. Bowens, 397 U.S. 49; Kelly v. Wyman, 294 F. Supp. 881,890,893 aff'd sub nom Goldberg v. Kelly, 397 U.S. 254.

In Roe v. Wade, 410 U.S. 113 (1973), the Plaintiff brought a suit challenging the abortion laws regulating and interfering with her right to determine for herself what would happen to her own body. By the time the case reached the Supreme Court, more than 9 months had passed, and it was certain that the woman had either had the child or had had an abortion. See Appellee's Brief in Roe v. Wade, 35 L. Ed. 2 at 732 where that argument was specifically made. Yet the Court decided that the appellant's claim was not moot since there was a controversy that was present and capable of repetition yet evading review.

Appellant also contends that he meets the "personal stake" in the litigation test. Flast v. Cohen, 392 U.S. 83 (1967); Baker v. Carr, 369 U.S. 186 (1962); Sierra Club v. Morton, 405 U.S. 727 (1972).

For a Defendant to establish that a case involving important public issues is moot, he must demonstrate"there is no reasonable expectation that the wrong will be repeated. The burden is a heavy one." U.S. v. W. T. Grant Co., 345 U.S. at 683. The appellee made a scant attempt to do so in this case. (Tr. 11).

As then Judge Blackman stated in Smith v. Board of Education, 365 F. 2d. 770,776 (8th Cir. 1966), "It has been stated that in order to have standing to litigate a constitutional issue one must be asserting the right in his own behalf. Tileston v. Ullmann, 318 U.S. 44 (1943). But this is only a rule of practice which may be outweighed by the need to protect ... fundamental rights; that need in turn will prompt courts on grounds of broad constitutional policy to proceed without blind adherence to technical rules of representation." quoted with approval in Torres v. N.Y. State Dept. of Labor, 318 F. Supp. at 1317.

Also see the following cases in which strong constitutional cases were presented in which the defendants satisfied the named plaintiff's individual grievance and then urged unsuccessfully that the case was moot since there was no appropriate plaintiff. Cypress v. Newport News General-Non Sectarian Hospital Assn., 375 F. 2d. 648 (4thCir. 1967) ;Jenkins v. United Gas Corp., 400 F. 2d. 28 (5th Cir. 1968); Buckner v. County School Board of Greene County, 332 F. 2d. 452 (4th Cir. 1964).

C. APPELLANT'S CAUSE OF ACTION IS NOT MOOT SINCE THE CONSTITUTIONAL ISSUES REMAIN AS TO THE UNNAMED MEMBERS OF THEIR CLASS AND TO APPELLANT.

Judge Holden stated in his memorandum, Page 3, that Plaintiff failed to sustain the burden of showing prerequisites for class action certification within the meaning of F.R.C.P. 23(a). However, appellant believes the court was heavily influenced by the revelation at the hearing the Appellee had decided to restore to Herbert P. Garvey, the status as payee. For, in the same paragraph in which Judge Holden decided that Plaintiff had failed to sustain the burden of establishing a class, he stated, "moreover, the Court has not reason to believe the Secretary will treat other proposed members of the class contrary to the administrative action taken in Plaintiff's case according to his notice to the Plaintiff on May 8, last."

So, it appears that the Court really did believe that there was a class of Plaintiffs in Mr. Garvey's situation and Appellant is at a loss as to the reason why if there was a class, the Court could maintain that the Appellee could destroy the cause of action of the class merely by granting one member of the class his relief. This procedure is against the weight of authority. In the area of unemployment compensation, see the cases of Steinberg v. Fusari, 364 F. Supp. 922 (D.Conn.1973); Wheeler v. Vermont, 335 F. Supp. 856 (D.Vt. 1972); Moore Federal Practice, Sec. 23.50 at 23-1103; Torres v. New York State Dept. of Labor, 405 U.S. 949 (1972) reh denied 410 U.S. 971 (1973). See also cases cited on Page 8 of this brief.

Judge Lasker in Torres, supra, goes even further than this, He relies on Moore's Federal Practice, paragraph 23.50, pages 23-1103 for the proposition that once a suit is filed as a class action than "it should be assumed to be one, and treated as such, even prior to the actual, formal determination that it is a class action." 318 F. Supp. at 317

Thus, as in Torres, Appellant Herbert Garvey's action was presumptively a class action from the beginning. Even though Herbert Garvey got his relief, i.e. restoration of his payee status, prior to the class action certification hearing, this did not benefit any other members of the class and to the unnamed member the action is not moot and should not have been dismissed. Moore's Federal Practice, paragraph 23.40, pages 23-651/23-652.

Appellant, of course, argues further that his own cause of action is not moot since the wrongdoing on the part of the Appellee is capable of repetition evading review as he has put forth in Argument B.

D. APPELLANT HAS MET HIS BURDEN OF PROOF IN ORDER TO CERTIFY THIS ACTION AS A CLASS ACTION OR IN THE ALTERNATIVE WAS NOT GIVEN THE PROPER OPPORTUNITY IN ORDER TO PRESENT THE INFORMATION.

Appellant's counsel began his class action presentation by asserting that there were numerous persons in Mr. Garvey's situation and that their exact identity would be obtained when the Defendant answered the interrogatories which had been directed to the Defendant (Tr. 6). Counsel further stated that he assumed that their number was such that it would be impracticable to have them joined in this action, but that this also would only be shown when the interrogatories were answered by the Defendant (Tr.7).

Appellant further represented to the Court that the Appellant could fairly and adequately represent the interests of all the members of the class (Tr.7). At this point counsel was questioned by the Court as to how the Appellant could be a proper representative since he had obtained all his relief (Tr. 8). Counsel asserted that the Appellee had only granted him limited relief but had not cured the due process defects in Appellee's procedures whereby Appellee had deprived Appellant of his payee status initially. (Tr. 8).

The Court then asked counsel for the Appellant whether or not he was prepared to pay the costs of notifying all the people in the class. Counsel responded that this could not be determined until the exact number of persons in the class was known (Tr. 12). (This information, of course, is exclusively

within the records of the Appellee, (Tr. 6).

If the court denied the class action status because if felt that the named representative could not provide proper notice to other members of the class, Appellant maintains that this denial would have also been done without full consideration of facts.

Appellant did not set forth that it had either a F.R.C.P. 23(b)(2) class action or a F.R.C.P. 23(b)(3) class action at the May 31, 1974, hearing and would argue that it did not have the opportunity to do so. Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804 (May 28, 1974) (Eisen III) had only been decided three days before the hearing and the impact of that decision was not discussed.

Appellant interprets Eisen III to mean that the named representative in a class action would be required to notify all class members in a 23 (b)(3) class action but not a 23(b)(2) class action. See the well reasoned opinion of Judge Coffrin in VLAIC, et al v. Davis, et al, Civil Action 74-49, (D. Vt. Nov. 1, 1974) which discusses and compares Eisen III and this court's opinion in Eisen v. Carlisle & Jacquelin, 391 F. 2d. 555, 564 (2nd Cir. 1968) (Eisen II).

Appellant maintains that it clearly fits the definition under F.R.C.P. 23(b)(2). The Social Security Administration defends its policy of administering the representative payee program as it applies to the proposed class thereby making it necessary for the Appellant to invoke injunctive and declaratory relief. Appellant has requested no monetary damages in its amended complaint and has agreed that damages is not a

part of his requested relief. (Tr. 9).

Thus, Appellant is arguing that a denial of class action status based on a lack of financial ability on the part of the named representative to pay for the notification in a F.R.C.P. 23(b)(2) class action would be improper.

As Judge Coffrin so aptly stated:

> "Due process in the class action context is somewhat different from due process as applied in individual actions. The essence of the class action is that it is a representative action. The representative participates fully in the action on behalf of the unnamed members of the class, and it is through him that the class reaps the benefits or suffers the losses of the action. Thus, a class action judgment is binding upon all members of the class even if they didn't have notice or otherwise participate in the action. See Note, Managing the Large Class Action: Eisen v. Carlisle & Jacquelin, 87 Harv. L. Rev. 426, 433-34 (1973); VLAIC v. Davis, supra at p. 7.

Appellant maintains that members of the class will only reap the benefit of receiving notice and opportunity for hearing prior to a transfer of benefits which can only save them from economic harm. Since there is no specific monetary damages involved in the suit, there could be no economic loss by other class member's failure to receive notice and thereby not participate in the action.

Judge Coffrin goes on to state further:

> "The class action mechanism and due process should not be viewed as opposing forces. Both are designed to protect or aid individuals in their attempts to achieve justice. Consequently, '[i]t would be ironic were the rigors of due process, designed to protect the interests of a class, to deny effective relief to that class.' Note, supra at 440." VLAIC v. Davis, supra at p. 8.

Judge Coffrin concludes that some notice ought to be given to the members of a 23 (b)(2) class but not individual notice. VLAIC v. Davis, supra at p. 8

Appellant contends that the same requirements should govern this litigation upon remand for further class action hearing.

At this point, the Court apparently decided that it had heard enough evidence, and stated that the Plaintiff had not met his burden of proof in establishing a class action. (Tr.13)

However, the Court did not specify in what manner the Appellant had not met his burden of proof, nor did the Court so specify in the memorandum opinion dated June 26, 1974. Counsel maintains that the Court decided, prematurely and wrongly, that the Appellant had obtained his desired relief and his case was therefore moot since the basis for the determination to end the hearing was incorrect as had been argued throughout this brief. Appellant was not given a proper hearing.

Appellant argues that the proper action would have been to have the hearing on the class action continued until such time as the Appellee had supplied the answers to the interrogatories. This the Court has the power to do under its own rules. (Local Rule 11).

Thus this matter has to be remanded in order to have a proper class action hearing and the Appellee's should be directed to supply the answers to the interrogatories prior to the new class action hearing.

CONCLUSION

Therefore, it is argued by the Appellant that Appellee's action restoring Mr. Garvey's Social Security checks to him directly as payee was an effort partly to rectify the improper way in which the representative payee status was originally granted to his son, Robert Garvey, and it was partly done in order to moot the Appellant's case and to deter a class action brought against it. However, the Appellee's action does not satisfy the underlying denial of due process accomplished by the Appellee's regulations which continue to remain in effect. Thus, Mr. Garvey and other recipients of Social Security benefits are still in danger of having their checks removed from them without notice or hearing unless this court acts to reverse the lower court.

Appellant maintains that class action status should have been granted to Appellant or at least a further hearing on the subject after the interrogatories had been answered by the Appellees and that substantial Federal questions have been posed by the Appellant's Complaint. Appellant maintains further that even if the class action were denied, that Appellant has sought declaratory relief as to the constitutionality of Appellee's statutes and regulations and is entitled

to a decision on this basis in order to avoid repetition of Appellee's action which has heretofore evaded review.

WHEREFORE, it is respectfully requested that this Court reverse the decision of the trial court and remand the case to the District of Vermont directing that a three-judge court be convened, that Appellant's interrogatories be answered by Appellees and that a further class action hearing be held.

Dated at the City of Rutland, County of Rutland and State of Vermont, this 11th day of November, 1974.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have, this 11th day of November, 1974, forwarded a copy of the foregoing APPELLANT'S BRIEF together with the Memorandum, Transcript and Order of May 31, 1974, to David Reed, Esq., Assistant U. S. Attorney, attorney for Appellee, by mailing the same to him to his office at Post Office Building, Rutland, Vermont 05701, via first class mail, postage prepaid.

Patrick R. Berg

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